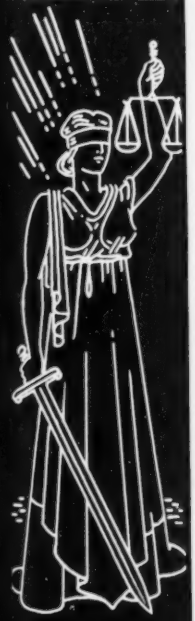

JULY-AUGUST 1949

Case *and* Comment

The Lawyers' Magazine — Established 1894

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ANNOTATION

Search warrants: disputing matters stated in supporting affidavit

[See ALR Digests, Search and Seizure, § 14.]

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§ 1. Introduction and scope; summary.

It is the general rule among the American jurisdictions that search warrants may not be issued except upon a showing of probable cause supported by oath or affirmation.[1] This showing generally takes the form of affidavits setting up the facts upon which the issuing magistrate

[1] See 47 Am Jur 516, Searches and Seizures, §§ 21 et seq.

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Condensed from Los Angeles
Bar Bulletin, February, 1949

A Corrupt Chancellor

by LEON R. YANKWICH, J.D., LL.D.
Judge, U. S. District Court, Los Angeles

THIS comment is on the impeachment and conviction of Francis Bacon for corruption while occupying the office of Lord Chancellor. The significance of this trial lies not only in the importance of the personality of Bacon, but also in the fact that the English judiciary, for centuries, has established a high standard of rectitude. For one holding the high office of Lord Chancellor to depart from that ideal would be tragic, even in the case of the average occupant. It is greater when it involves a man who has achieved the undying fame of Bacon.

Lytton Strachey, in his "Elizabeth and Essex," deals harshly with him. He thinks that Bacon should not have consented to act as prosecutor in the trial of Essex for treason. Loyalty, he argues, should have dictated a contrary policy. For Essex had befriended him, and, for years, had tried to secure for him an official position in the legal establishment of the country.

To those who remember Bacon as Lord Chancellor and as the famous author of the Novum Organum,—which is considered by many as lying at the basis of the modern scientific method,—and of the equally famous Essays (even if we exclude those who would attribute the Shakespearean plays to him), the harshness of Strachey's strictures seemed extreme. But Strachey was not indulging in mere iconoclasm. He knew. He saw in Francis Bacon the weak, vacillating character that he was, and which he remained to the end. For history discloses that Bacon died a self-confessed felon, guilty, *according to his own confession*, of bribery and corruption in the office of Lord Chancellor.

Before referring to his impeachment and plea, I advert to some important dates in Bacon's life. He was born in London on January 22, 1560, the youngest son of Sir Nicholas Bacon, the Lord Keeper. He entered Trinity College in April, 1573, where he showed great interest in the sciences. With his brother Anthony, he was entered at Gray's Inn on June 27, 1576. Some months later, he was sent abroad with Sir Amyas Paullet, English Ambassador at Paris. He took

up his residence at Gray's Inn in 1579, and was admitted an outer barrister in 1582. He was elected to Parliament from Dorsetshire in 1584, and from Middlesex in 1593. In 1591, he was acting as adviser to Robert, Earl of Essex. Bacon had antagonized Queen Elizabeth by his opposition to a proposal in Parliament to levy a double subsidy. Essex did all in his power to induce the Queen to give Bacon the office of Master of the Rolls. Essex also deeded to him (in 1593) a piece of land near Twickenham.

With the disgrace of Essex, and his prosecution for treason in 1601, Bacon saw the opportunity to regain royal favor and to advance his own career. He became one of the Queen's counsel in the prosecution against Essex. After the accession of James I, he was knighted, in 1603. In June, 1607, he was made Solicitor of the Kingdom. In 1613, he was made Attorney General. In 1616, he was given the title of Lord Keeper. In 1617, he was made Lord Chancellor. In the same year, he was made Baron Verulam, and in January, 1620, he was made Viscount St. Albans. In the same year, he published his most important work, Novum Organum, or The Advancement of Learning, which laid the basis for the inductive method of discerning the truth.

The quality of his mind, he has described himself, in one of his works. Speaking of his interests while at Trinity, he wrote:

> "I found that I was fitted for nothing so well as for the study of truth; as having a mind nimble and versatile enough to catch the resemblance of things (which is the chief point) and at the [same] time steady enough to fix and distinguish their subtler differences; as being gifted by nature with desire to seek, patience to doubt, fondness to meditate, slowness to assert, readiness to consider, carefulness to dispose and set in order; nor admits what is old and that hates every kind of imposture. So I thought my nature had a kind of familiarity and relation with Truth."

Modern historians agree that in this statement, Bacon characterized accurately his own mental make-up. Alfred North Whitehead, after placing Bacon's contributions to the modern scientific method in their proper perspective, says:

> "But when you have made all requisite deductions, Bacon remains as one of the great builders who constructed the mind of the modern world."

The Articles of Impeachment against him were presented by the managers of the House of Commons to the House of Lords on March 20, 1620. They contained twenty-four accusations of bribery, charging the acceptance of a total of 9,016 Pounds, a huge fortune in those days. One of the strangest things in the record is the fact that in many instances, Bacon accepted bribes from both parties to a case before him. In a cause be-

tween Sir Rowland Egerton and Edward Egerton, he received from Sir Rowland Egerton *before* "he decreed for him" 300 Pounds. From the losing party, Edward Egerton, he received 400 pounds. In another cause, between Scott and Lenthall, he received 200 Pounds from Scott and 100 Pounds from Lenthall. The record does not say whether, as in the other case, the losing litigant paid more than the winner.

Appointed a referee in a matter involving a dispute between the grocers and apothecaries, he received from the grocers 200 Pounds and from the apothecaries 150 Pounds "besides a rich present of ambergris." Bacon did not stop at money bribes. He accepted bribes in kind. In one instance, he accepted a dozen buttons of the value of 50 Pounds from a litigant, after a suit had ended. In a case between Kenday and Valore, he received of Kenday a cabinet worth 800 Pounds and of Valore he borrowed 2000 Pounds.

Bacon did not content himself with extorting money from litigants. For a fee, he used his high office to coerce persons. Otherwise put, Bacon used the methods of the modern racketeer. The Articles of Impeachment charged:

"Of the French merchants, to constrain the vintners of London to take 1500 tons of wine; to accomplish which, he used very indirect means, by colour of his office and authority, without bill or other suit depending, as threatening and imprisoning the vintners, for which he received of the merchants 1000 Pounds."

It is unfortunate that, in view of Bacon's plea of guilty, the details of some of these transactions were not disclosed. It would be instructive to know how rackets were worked in the olden days. One can almost visualize what took place in the case of the French merchants. Evidently, they had some agreement with the vintners of London, which the latter did not desire to fulfill. It is possible that the agreement was not enforceable in the English courts. So the French merchants,—with a realism which is reminiscent of the methods employed by some modern dominant groups to achieve results,—"hired" the Lord Chancellor, the highest judicial officer of the Kingdom, in order to achieve the results by threats and intimidations under the color of his high office.

At times we speak of rackets as though they were a modern invention. The name may be new. But the technique is old. For in the last analysis, they are methods for obtaining advantages to which one is not entitled under the law or by means not sanctioned by law. And Bacon was willing to assist in "putting over" a racket, by using his high office. His corrupting influence did not stop at himself. It extended to those about him. For he was also accused of allowing even his servants to

exact tribute. The last accusation in the Articles of Impeachment was:

"That he had given way to great exactions by his servants, in respect of private seals, and scaling injunctions."

Confronted with the accusation, Bacon, at first, bargained. He wrote a pious and humble letter trying to ascertain if the Lords would not accept his "submission" as sentence, the loss of his seal as punishment, and recommend him to the King's pardon. The Lords called the answer "doubtful" and asked him whether he would confess or stand "upon his defense."

Bacon then abjectly admitted his guilt in a letter dated April 30, 1620. The introduction to the letter read:

"Upon advised consideration of the Charge, descending into my own conscience, and calling my memory to account so far as I am able, I do plainly and ingenuously confess, *that I am guilty of Corruption*, and do renounce all Defence, and put myself upon the grace and mercy of your lordships."

After pleading guilty to the substance of all the charges, the letter concluded:

"For extenuation, I will use none concerning the matters themselves; only it may please your lordships, out of your nobleness, to cast your eyes of compassion upon my person and estate; I was never noted for an avaricious man, and the apostle saith, 'That covetousness is the root of all evil!' I hope also that your lordships do rather find me in the state of grace, for that in all these particulars there are few or none that are not almost two years old; whereas those, that have an habit of Corruption, do commonly wax worse. So that it hath pleased God to prepare me by precedent degrees of amendment to my present penitency; and for my estate, it is so mean and poor, as my care is now chiefly to satisfy my debts. And so fearing I have troubled your lordships too long, I shall conclude with an humble suit unto you, That if your lordships proceed to Sentence, your Sentence may not be heavy to my ruin, but gracious and mixed with mercy; and not only so, but that you would be noble intercessors for me to his majesty likewise, for his grace and favour. Your lordships' most humble servant and suppliant.

Franc. St. Albans, Cane."

He was fined 40,000 Pounds. He was stripped of his peerage and his honors, and sentenced to imprisonment in the Tower, at the King's pleasure. The fine was later remitted. He actually served only a few days in the Tower, and was pardoned in November, 1621. He died (*some say in poverty and want*) on April 9, 1626.

And his life exemplifies the fact that intellectual brilliance, even genius, *does not necessarily spell character*. The tragedy of a morally wasted life is summed up in François Villon's sad refrain: *Je cognois tous, forsque moi mesme.* (I know all but myself.)

Certainly, Bacon knew *all*, but himself. In his Essays he gave expression to the loftiest idealism. In his essay on Judicature, he speaks of "integrity" as the portion of judges, and their

proper virtue and warns against improper acts by subalterns:

"The place of justice," he writes, *"is an hallowed place; and therefore not only the bench, but the foot pace and precincts, and purprise thereof, ought to be preserved without scandal and corruption."*

More is the pity. Reason may not always supply the divine spark which lights character and impels that choice which is the foundation for right action. To study truth may not always *mean to live it.* This is the lesson of Bacon's tragic fall.

Requisites of a Lawyer

"It is not enough for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts in his profession that he does not deserve that confidence, he is no longer an aid to the court nor a safe guide to his clients. A lawyer needs, indeed, to be learned. It would be well if he could be learned in all the learning of the schools. There is nothing to which the wit of man has been turned that may not become the subject of his inquiries. Then, of course, he must be specially skilled in the books and the rules of his own profession. And he must have prudence, and tact to use his learning, and foresight, and industry, and courage." Fairfield County Bar v. Taylor, 60 Conn. 11, 22 Atl. Rep. 441.

New Legal Stenographer's Transcription of Divorce Bill

Counsellor Bridgewater, who was a stickler for good pleading and strictly complying with the statutes, dictated to his new stenographer just out of business school a divorce bill on behalf of a wife based on the grounds of cruel and inhuman treatment. Among other allegations, she alleged that her husband was miserly and would not permit her to buy clothing and, in fact, had greatly embarrassed her on one occasion by forcing her to return a red dress which she had bought.

In transcribing the statutory oath to the bill, the stenographer wrote that the complaining wife made oath that she was a resident, etc. and that her complaint was not made out of levity, or by collusion with the defendant, but in sincerity and truth, for the causes mentioned in the bill, etc. and that she was unable to bear the expense of this action, but that she was justly entitled to the red dress she sought (instead of the redress sought).

Contributor: Attorney Sam F. Cole
Memphis, Tenn.

Jurisprudence and the Crucifixion

By R. G. SAPPENFIELD
of the Geneva (Illinois) Bar

WE ARE prone to think of the Hebrews of the Old Testament periods as unenlightened people employing primitive methods, but, surprising as it may be, some features of the legalistic system of Israel are present in modern Anglo-American law. Some offences, both criminal and civil, set out in the Mosaic Code, are not unlike those of our modern law, although the penalties and remedies, in some instances, are quite different. Interesting for study are such subjects as Murder (Exodus 21:12); Manslaughter (Exodus 21:13); Kidnapping (Exodus 21:16); Assault (Exodus 21:18, 19); Trespass (Exodus 22:5, 6, 9); Bailments (Exodus 22:7, 8; 10-15); Seduction (Exodus 22:16, 17); Usury (Exodus 22:25, 26); Slander (Exodus 23:1), and Bribery (Exodus 23:8).

There were thirty-six crimes punishable by death mentioned in the Pentateuch and the Talmud. Four methods of capital punishment (none of which are presently used in common law countries) were provided: Beheading· Strangling; Burning; and Stoning. Blasphemy under Hebrew jurisprudence was a capital crime, the penalty, upon conviction, being death by *stoning* (Mendelsohn, pp 45-50). Crucifixion was unknown to Jewish law.

In the light of the peculiar procedural provisions of the Hebrew criminal law we can better understand why the Holy Spirit in inspiring the Gospels caused the unlearned and ignorant tax collector and the fisherman to describe, in such technical detail in the Scriptures, those things which occurred just before and after Jesus was taken into custody. The events which led to His arrest began with the question asked of Jesus by the disciples as to "where wilt Thou that we prepare for Thee to eat the Passover?" (Matthew 26:17) The answer was given and the disciples followed Jesus' directions, and "Now when the even was come, He sat down with the twelve." (Matthew 26:20; Luke 22:14) That gathering, the disciples learned, while eating the Passover with Our Master, was to be the "last supper". Within a few hours Jesus was

betrayed by Judas (Matthew 26:47, Luke 22:47) who "'Then, having received a band of men and officers from the chief priests and Pharisees, cometh thither with *lanterns* and *torches* and weapons." (John 18:3) "Then the band and the captain and officers of the Jews took Jesus and bound him." (John 18:12) The assertion that members of the mob, for which Judas identified Jesus, carried lanterns and torches, emphasizes that the arrest of Jesus was made at night in violation of the Hebrew criminal law, a fact, not readily recognized by readers of the Scriptures. This was on the 14th Nisan, according to the Jewish calendar; the 14th Nisan, having begun at sunset April 6th and continued to sunset April 7th, A. D. 30, according to our calendar.

Jesus, upon being arrested, was led "away to the high priest; and with him were assembled all the chief priests and the elders and the scribes." (Mark 14:53) And although the Hebrew Criminal Law required criminal witnesses to bring the indictment (there being no grand jury or prosecuting attorney) "the chief priests and all the council *sought* for witnesses against Jesus to put Him to death." (Mark 14:55) The solicitation of witnesses by the Sanhedrin was illegal, but that was not all—in response to the search for witnesses against Jesus to put Him to death, we are told none were found "for many bore *false* witness against Him but their witness *agreed not together*." The significance, from a legalistic viewpoint, of the statement that the testimony of the witnesses agreed not together, though not generally recognized, is clear when considered in the light of the fact that under Hebrew criminal procedure, the testimony of at least two witnesses had to be in agreement, otherwise the testimony of both had to be rejected. (Cf. Deuteronomy 17:6)

Jesus was charged with having committed *blasphemy* first by the false witnesses whose testimony, "agreed not together," and later by the high priest. (Matthew 26:65) When recognizing that the testimony of the false witnesses should be rejected, the high priest undertook to obtain a confession from Jesus that He had said He could or would destroy the temple and could or would build it in three days (Mark 14:60) but Jesus "held His peace and answered

nothing." (Mark 14:61) However, when the high priest changed the question to "Art Thou the Christ, the Son of the Blessed," Jesus broke His silence, and answered, "I am: and ye shall see the Son of man sitting on the right hand of power, and coming in the clouds of heaven." (Mark 14:61-62) It was then the high priest lost his temper, and rent his clothes. (Matthew 26:65)

Jesus was illegally tried by the Sanhedrin because the trial was held on a feast day, the first day of the feast of unleavened bread (John 18:28) also on a day preceding the Sabbath. Morever the conviction of Jesus was contrary to law because the verdict was unanimous, as Mark tells us "They *all* condemned Him to be guilty of death." (Mark 14:64) The rule that unanimity in the verdict was tantamount to an *acquittal* seems strange, at first, to us who are familiar with the Anglo-Saxon jury system which requires a unanimous verdict to *convict*, but when considering that under the Hebrew system the alleged criminal had no lawyer to defend him, while under our common law the defendant cannot be tried without counsel, it can be seen as reasonable that at least one member of the Sanhedrin was expected to take the side of the accused.

All the safeguards, provided by Hebrew Criminal Law to protect the innocent, plus the willingness of the Roman governor to release Him, could not prevent the fulfillment of God's prophecy, nor stay even for a day the time of fulfillment, when the appointed time arrived.

To those who reject His atoning death, the crucifixion is the mere satisfaction of the judgment of Pilate that Jesus, the Son of Joseph, pay, with His life, the penalty for His alleged crime against Caesar. To those who accept Him as a personal Saviour, Calvary is the satisfaction of the judgment of God that Christ, the Son of God, pay, with His life, the penalty for man's sin against God. For the former there is eternal condemnation; for the latter, eternal life. (John 3:16-36)

Many who think of themselves

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as Christians have never accepted God's plan of salvation. Some openly deny Him and the object of the cross; some, perhaps, are sincere in the *thought* that they are Christians, having applied, to and for themselves, the test of church membership and/or good works. Our church rolls, of all denominations at many places, are replete with, and even some church pulpits and offices are occupied by, those who deny that Christ's *death* was necessary for man's salvation, notwithstanding that the Scriptures plainly teach, "Without shedding of blood is no remission." (Hebrews 9:22)

While God is not willing that any should perish but that all should come to repentance (2 Peter 3:9) the Scriptures are clear that "he that believeth not God hath made Him a *liar;* because he believeth not the *record* that God gave of His Son." (1 John 5:10)

Right to Argument

"Argument is not only a right, but a material one. It is not a mere ornamental fringe, hung upon the border of a trial. Trial, under our system, is a co-operation of minds —a grave and serious consultation over what should be done and how the end should be accomplished. The attorneys in the cause are not mere carriers to bring in materials for constructing the edifice; they have a right, as representing the parties, to suggest where every important stone should be laid, and to assign reasons, drawn from legitimate sources, in support of their suggestions. Their reasons may be good or bad, but such as they are they should be heard and considered." Van Dyke v. Martin, 55 Ga. 466, per Bleckley, J.

Sufficient Proof

In an action on a note the plaintiff testified as to its execution. Eight other witnesses, including two lawyers and the county clerk, all of whom were familiar with the defendant's handwriting, pronounced the signature to the note genuine. Two other witnesses testified that the defendant had told them that the signature looked like his, but that if he had signed the note he had forgotten it. The defendant testified that he had never signed the note— and that he was a member of the Methodist church. *Held,* that a verdict for the defendant should be set aside as against the weight of the evidence. Patrick v. Carr, 50 Miss. 199.

WORLD FEDERALISM

by HENRY C. GARDINER
of the San Diego (Calif.) Bar

IT MAY be presumptious for an obscure practitioner to essay the role of a modern little David in attempting to pierce the armor of the mental giants who have assumed the leadership of World Federalism. But many Americans are not convinced that a surrender of sovereignty would be beneficial to our country or would contribute to the solution of the problem of the ages. Before giving up this natural attribute they ask the many types of Federalists to get together and fully disclose the plans and details for the accomplishment of their objective.

Like all idealists they are so sure of an historic parallel between their proposed Federation and the American federal government, although history can furnish no greater contrast of governmental conditions than those of the colonies of 1787 with conditions throughout the world today. Our Constitution was adopted after an experience of over a hundred years of colonial self-government. The composite group of states grew into a single unit of the same people, with the same background, language and interests, with similar laws, customs and aspirations, and, not least of all, the same Christian religion. The Constitution is not a pattern from which may be cut a new government regardless of difficulties and impossibilities. The new sovereignty would be a Babel of remote nations of numberless tongues, with mixtures of all races, antagonisms, prejudices and religions, wholly unused to democracy or to representative government, with inability as shown by practically all of them, to understand the dual federal system peculiar to us. Even the British as shown recently in the discussions over the Atlantic Pact, do not fully understand it.

Then is World Government to include *all* the nations or only a select few? If not all then it is like any other pact. When we speak of world peace, our thoughts turn instinctively to Russia as the problem of the most weight. On what terms or conditions would she be admitted? With all her satellites as separate nations? What if she refused to join on any other terms? They say "Lets give up our sovereignty." To whom or to what? Who will be the head or president of the new sovereignty, a Hindoo, Russian or Chinese? China, India and Rus-

sia compose the vast majority of the most important people of the world, and if the new sovereignty is a republic or a democracy, the majority would rule. On what terms and at what stage of the proceedings would Spain be admitted? The new sovereignty to enforce its authority should have the strongest armed force in the world, stronger than any probable combination against it. It would mean the greatest navy. Would the U. S. turn over to the World Government our navy, our army and all our stock pile of bombs and war materials, and our experts trained in their use? And if not, where would the new nation get all the necessary "police force" for the enforcement of its edicts? And how would this mighty force be maintained? Our experience with the Confederation of 1777, and the later experience with the League of Nations and the United Nations, in the effort to obtain contributions to pay expenses, are the very reasons for now demanding a new Sovereignty. If taxes were levied on the member nations how is it proposed to collect such tax? By the navy, army and air force? How long then might it be before we began to hear rumblings of new Declarations of Independence? These and numberless other problems of equal importance will confront the new statesmen when they meet to form a new government with sovereign powers. Our present administration is now having its troubles over unity of command for the defense forces. With the varied shades of color, would the new "police" forces be segregated or the officers segregated, and how would the levies be made on the member nations? Or would all be mixed together according to Communist plan?

It will be said that all these are questions of detail and will be worked out when the representatives meet. Instead of giving consideration to practical matters of government, they continue with Mark Tapley optimism, "Somewhere, some how, it will turn out all right if we

only 'do something' and decide upon World Sovereignty." These questions cannot be answered by a flip. The framers of the U. S. Constitution took no such easy view of their task. Compared with the present day situation theirs was the work for mental pygmies. Yet they were the only class of men who could have written the Constitution of 1787. Only the men of the class who had practiced self-government for 150 years, who knew what Magna Charta, the Bill of Rights and the Mayflower Compact meant could have drawn that instrument.

Our statesmen all agree that the success of the framers of the Constitution in reconciling national supremacy and efficiency with liberty and local self-government, is one of the great achievements of mankind. And it is an insoluble mystery to them that the public men of other nations do not understand it. They are the men who would start from scratch to draw up the rules for the most powerful government of history, born full armed, like Minerva, the moment sovereign powers are bestowed beyond recall. No wonder that thinking Americans stand aghast at the colossal proposition!

Sovereignty is a natural attribute of nations whatever may be the form of government. But what can be termed international co-operative housekeeping, with chief, or chef, in charge, is an invention of modernizers ambitious to "do something." Have we forgotten the fable of the frogs who prayed for a king who would "do something"? The very idealism of the United Nations has a greater influence for peace than World Sovereignty with all its bombs, and guns and ships and steel.

We hope the World Federalists will count the cost and not permit themselves to be assured that the establishment of world government will not mean the end of the American Republic. Its beacon light enlightening the world in three centuries of eventful years is brighter today than in its original radiance. Let us not exchange it for a red flag or a dark lantern!

Local Economic Problems

Actually overheard in one of the elevators of the New York County Hall of Records:

Older Lawyer to Younger Lawyer: "Congratulate me; I have just completed forty-five years at the bar."

Younger Ditto: "Congratulations! Tell me, just how have you managed to escape starvation?"

Contributor: Louis H. Samuels
New York City

Give the Reporter a Break

BY H. N. WOODMAN
Reporter, District Court, Colorado

✦

Condensed from Dicta, April, 1949

ATTORNEYS are ever mindful of the effect of their courtroom methods upon juries. Many fail to appreciate, however, that indistinct speech, poor selection of words, false starts, a monotonous or an uncultivated delivery, create an unfavorable impression upon those whom it is sought to influence.

Nothing more quickly arrests the attention or captures the interest of judge and jury than a straightforward examination or argument expressed in clear, simple and classic English.

The succinct statement of objections on the record makes it possible for the Court to rule promptly. Judges prefer this practice. Counsel will often argue the merits of an offer or a question without actually objecting.

The manner of argument often sways the jury, sometimes adversely. I have in mind two instances of attorneys in closing arguments accusing witnesses of lying, illustrating widely different methods of approach. Both were accompanied by unusual items of physical gesture: in the first, sweeping a glass of water off the attorney's stand; in the second, the breaking of a glass table top. The first went something like this (berating the police department): "Why, ladies and gentlemen, look at that flat-nosed detective over there. Do you suppose he could tell the truth? No. And take this captain of detectives. He lied to you, trying to uphold the department," and so on. The second instance: "The witness I know did not mean what he said. I don't think he really intended to make that statement, in the light of the real facts. Why, ladies and gentlemen, it is astounding (pounding table and breaking glass top)—oh, oh, I owe the County forty bucks— it is astounding that the witness would make a statement like that."

Well, in the first instance, the jury resented counsel's offensive remarks and were amused at his discomfiture in knocking off the glass of water. In the second instance, the jury felt sorry for the man who broke the glass top. Verdicts were returned accordingly.

May I now say something about the record, with which I

deal in the courtroom. You realize that the shorthand reporter is under a nervous and mental strain at all times. He cannot relax, because just about the time he thinks things are going along nicely, bang! everything breaks loose—a simple question, an attorney on his feet making an objection, the examining attorney trying to substantiate his question, the witness hastening to answer it for fear he might be shut off, all at the same time. Of course, an experienced reporter has dealt with these situations many times, but still the tendency is to "hit the ceiling"—and switch to Calvert.

A reporter's exasperation is sometimes amusing to others. An informal hearing was being held by a referee in the courtroom of the old Walsenburg courthouse. The wind was blowing, causing the loose window panes to rattle and the awnings to thump. This was rather nerve-racking to the reporter, who was trying to hear a low-talking witness. The town's old-

"They're going to televise part of it—so we'd better not take any chances."

timers drifted in to see what was going on. They pushed open the old, creaking, full-length batwing doors, greeted one another, "Hello, Bill," "Hello, Jake; how's everything below." All this increased the difficulties of the reporter, particularly with the key words, and caused him to boil inwardly. The climax came when one old-timer shuffled forward to the vacant jury box to get a better view. He walked up the steps to a top seat and in sitting down kicked over a metal cuspidor, which went merrily bumpity-bump down the steps to the floor. The reporter was unable to restrain himself. He jumped up, grabbed his chair, pounded it on the floor, and cried out, "For Krisesake, if we're going to have noise, let's have some."

On another occasion, in a similar hearing before a referee, the witness chair was placed close to the shaky reporter's table. The witness crossed his legs and with his free foot nervously began to kick the table, causing the reporter's pen to jump and record unreadable outlines. The reporter politely requested the witness to cease kicking the table, but after a lull he continued. The reporter warned the witness a second time, but again the foot-thump, thump, thump, and the pen-jump, jump, jump. This time the exasperated reporter reached over and jabbed his pen into the witness' leg!

I can best illustrate the mental and nervous strain of taking steady cross-examination by the example of anyone writing longhand for an hour or so at top speed. By the end of that time he is ready to recess, just as is the reporter. Of course, the reporter is trained to carry on with as much ease and temperament as possible, but at times the going gets pretty tough. And if the reporter in reading some of the proceedings hesitates, you may remember that even in fast longhand writing you, yourself, in hurried translation, have hesitated over a word or phrase that was perfectly legible in calmer moments. But, again, I have been impressed by the kindness and courtesy of the legal profession. I think all lawyers realize the difficulties faced by the reporter in his daily work.

In presenting an exhibit, please pause while the reporter marks it. A short time ago we had the incident where counsel said, "Now, while the reporter is marking the exhibit, let me ask you this:" In other words, the reporter cannot simultaneously mark exhibits and record testimony; he should be given sufficient time to mark and index the exhibit before the next question is asked. If numerous exhibits are to be marked, it is extremely helpful to the reporter and to the participants in the trial that they be marked in advance to avoid unnecessary delay in the proceedings.

When the character of the exhibit is such that it is intended to be withdrawn, the attorney should state his intention so to do at the time of presenting the exhibit and ask leave to make the substitution.

In making offer of an exhibit counsel should identify it briefly: that is, "I offer in evidence Exhibit 16, a letter dated February 10, 1948, from A. B. Jones to R. H. Smith." It often happens that two or more letters may bear the same date. Reference in succeeding questions to "this letter" or "that paper," without adequate identification, makes the record meaningless.

I mentioned key words. Let me illustrate: In an epidemic of colds, with its attendant coughing and sneezing, the reporter, having interrupted frequently and being inclined to keep quiet and do his best, really becomes discouraged when he runs into something like this: "A. I was going down (cough) street, proceeding about (sneeze) miles an hour, when I was hit by a truck belonging to the (cough) company."

When the questioner, familiar with the facts, asks: "What happened after, as you say, you were travelling down *Tenth Street* at about *twenty* miles an hour and were hit by the *Weicker* truck?" he really has to dodge to escape being embraced by the reporter.

Of late years, in civil procedure, we have done away with the practice of filing a bill of exceptions on appeal and are now presenting what is called a reporter's transcript. Not long ago counsel were always careful to note exceptions to the Court's rulings, but now that is not necessary.

One of the most annoying practices of some lawyers is what reporters call "echoing," that is, repeating the answers of witnesses while mentally attempting to frame the succeeding questions.

Since the reporter is called upon to render a verbatim transcript of witnesses' testimony, the response of the witness to the repeated question must be recorded, thus creating an unnecessary duplication distracting to the reporter, time-wasting to the judge or reviewing body, and expensive to litigants.

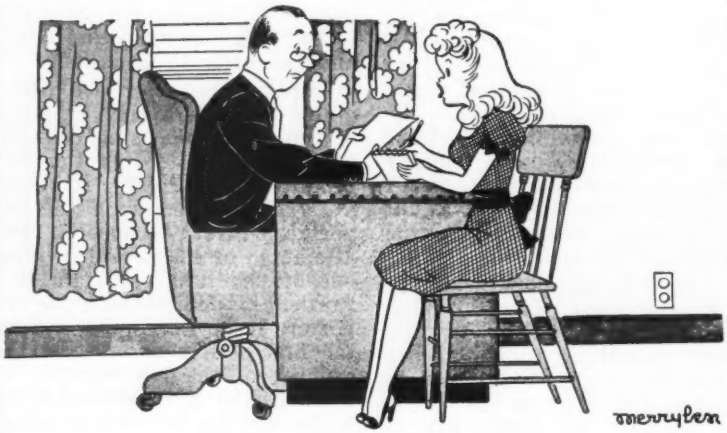
Impatient counsel are often guilty of interrupting remarks of the Court, opposing counsel, or the witness. Often this approaches discourtesy. It places a terrific burden upon the reporter. First, because of the attempted or effective drowning out of the first speaker's last words. Second, because the reporter, if he hears the end of the first statement and the beginning of the interruption, is compelled to carry both in mind while writing at terrific speed to "catch up."

This being the case when only two persons refuse to let each other finish, what can be said or

done when three or four arise simultaneously to give vocal vent to their outraged feelings. The transcript, in such case, may be replete with broken statements.

The accents of foreign witnesses, the use of colloquialisms, the swallowing of words, the incorrect choice of language, the elision of material words, and generally the use of unclear, inaudible speech, all necessitate a distinct and independent mental operation on the part of the reporter in transcribing the sound heard into words conveying some degree of intelligibility. The inaudible witness drives the reporter to distraction, often affecting his ability to absorb intelligently the following question when he is still trying to decipher the witness' last remarks, although some of it may be as meaningless as the colloquy between the restaurant customer and the waitress. He said, "Sister, gimme a cuppa coffee *without cream.*" She replied, "Mister, you'll have to take it *without milk.* We ain't got no cream."

In general, nothing is more upsetting to the reporter's mental equilibrium than the inability to hear distinctly each word uttered, necessitating guessing at intervening words and wonder-



"I got the 'Dear Sir' and 'Yours truly'—if you'll just repeat the part between. . . ."

ing whether the guess is correct while the flood of speech goes on and on. This takes place frequently when counsel turns his back to the reporter to address a remark to opposing counsel. Oftentimes the reporter hears "That is conceded," or "I will agree to that," without having heard anything more than the sound of a whispered conversation, which he assumes has been the subject matter of the concession desired. Counsel undoubtedly expect the reporter to note the concession, but what it relates to is bound to remain a mystery, unless counsel make certain to state the concession or stipulation on the record.

The accelerated tempo of modern life is in some measure responsible for the confusion in this respect. Older members of the bar will recall the meticulous care with which papers were drawn; the scrupulous deference to Court, opposing counsel and witnesses at the trial; the deliberateness and scholarliness of utterance which characterized the barrister of former years.

Congestion in the courts, pressure of economic necessity, and the nervous haste of modern-day life have apparently changed all this. Higher academic requirements for admission to the bar have not resulted in greater culture, nor in improved ability to express thoughts through the medium of language. Chopped enunciation, ragged sentences, slurred words, poor grammatical construction, are so commonplace today that the clear and precise wielder of the English tongue is the marked exception that arouses wonderment and attention.

Bearing in mind the importance of the finished record to Court, counsel and parties-litigant, it would seem self-evident that those concerned in using the record should exercise the greatest degree of care in its making. The nation-wide experience of reporters over many years leads to the inescapable conclusion, however, that exactly the opposite is too often the case.

Finally, let me illustrate what the reporter appreciates. For example, the spelling of a name. Of course, on a witness taking the stand, the Court or counsel ordinarily will ask for the spelling of an unusual name, but occasionally this is overlooked. When Joe Prelocktowitz took the stand recently and gave his name, the reporter asked him to spell it, and the witness replied, "Aw, just call me Joe—J-o-e." So all I ask you to do is to call me Woody—W-o-o-d-y—so that I in turn may whisper to you, "Buddy—B-u-d-d-y—give the reporter a break."

Conciliation Rather Than Reconciliation...

By JULIUS H. MINER
Judge of Circuit Court of Cook County, Illinois

Extracted from Illinois Law Review, September-October, 1948

PRACTICALLY one out of every three marriages in the United States ends in failure. Approximately 359,000 divorce decrees were granted in the United States in 1943, 400,000 in 1944, 490,000 in 1945, and 620,000 in 1946. These totals do not include the avalanche of decrees of separate maintenance everywhere. In Illinois alone, the divorce rate jumped proportionately from 18,318 in 1940 to 35,275 in 1946. According to leading statisticians and sociologists the ratio will be one divorce for every marriage by 1958, if the present rate of increase continues.

Hon. Julius H. Miner

Nowhere do we detect evidence of deceleration in the progressive rate at which homes are collapsing, and we all have cause for alarm at the sight of the millions of children affected. The annual Illinois state-wide cost of aiding "broken home" dependent children is in excess of $5,600,000. The causal relation between divorce and juvenile delinquency is clear. The children, emotionally disrupted by the deprivation of the influence and security of a normal home life, often drift into crime. Records of the Juvenile Court of Cook County and the Boy's Court of Chicago indicate that approximately 80 percent of their cases are traceable to broken homes.

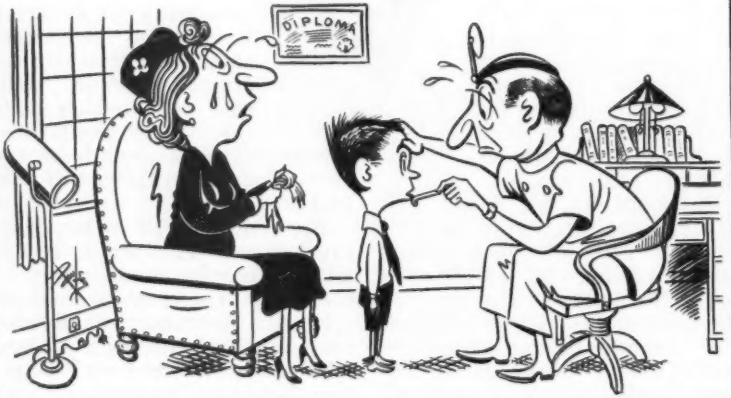
This steady flow of divorce calls for a revision of our present thinking on the subject and counsels direct and immediate action. One possibility for materially checking the menace should be presently examined, namely, the ease with which suits for divorce are filed as distinguished from the final granting of decrees.

Far too much effort has been exerted in attempting to reconcile the parties to divorce proceedings. The truth is that despite the astronomical figures cited by the reconcilers, divorce dockets are cluttered with litigation between "reconciled" couples, and the chancellors divorce them daily by the score. Their enforced second honeymoon (after the filing of suit for di-

vorce) is of brief duration, soon to end in another courtroom.

Fights are rarely abandoned voluntarily after the combatants are in the ring and the gong is sounded. They go on to a decision or knockout. Prior to their entry into the legal arena, many domestic differences, however serious, may be ironed out satisfactorily. The tragedy begins with the mad rush to terminate the relationship without due reflection and timely advice. The filing of the suit for divorce or separate maintenance is the sounding of the gong. It is the consummation of the breach, the virtual passing of the healing possibility.

This is readily understandable. Marriage is the most personal and intimate of all human relations. Its weaknesses are most sensitive to exposure. The instituting of litigation is such a severe blow to the relationship that the parties seldom recover from it. The complaint must bare the dark "causes" for divorce, secrets locked and guarded until that fatal moment. The defendant is portrayed as a scoundrel and a cheat by the very one who promised to "love and cherish." Most damaging of all is that the children's loyalties become necessarily divided. Their support and custody are integral parts of the litigation.



"I'm worried about him, Doctor! Instead of reading comic-books like the other boys, he reads stuff like . . . JONES ON EVIDENCE!"

Efforts to reconcile the litigating couples should continue, but can successful reconciliation be reasonably expected under the humiliating circumstances of a public suit? The filing of the suit has inflicted an irreparable injury to pride and self-respect, which even the most friendly court can rarely heal.

Most mothers, I believe, would suffer much in order to avoid filing suits for the dissolution of the family unit. The mother goes through endless debate with herself after the filing of the suit. Probably one-third of our divorces might be prevented if, before coming into court, the wife and mother found a friendly official with whom to talk the situation over. Must the judiciary wait until the family is actually wrecked and a "filing fee" paid before it extends a helping hand to innocent child victims? Is it not more humane, more efficient, and more expedient for the court to make itself available to the depressed and blundering parents before their marriage is shattered and their children irreparably hurt?

The three major disturbing factors in married life are sexual incompatibility, financial problems and temperamental differences. In a considerable number of families a doctor or psychiatrist could well aid in sex adjustment. A trained and sympathetic counsellor could seek to ascertain the basic causes of the trouble between the spouses and could recommend desirable changes and adjustments.

Experts and social statisticians generally agree that stringent divorce laws do not substantially cut down divorces. They merely produce certain anti-social results and legal hypocrisy encouraging subterfuge and collusion. The interlocutory decree system, with a waiting period between preliminary and final decree, was discarded in several jurisdictions because it encourages widespread immorality. As already pointed out, the greatly heralded reconciliation under judicial "pressure" is, in too many instances, but a brief moratorium of marital hostility. It becomes obvious, therefore, that major results, if any are obtainable in preserving domestic stability, can come only from guarding against hasty filing of suits for divorce or separation.

The court should address itself to the problem of conciliation, rather than reconciliation, if its efforts to protect the sanctity of the home are to be at all fruitful. The court should seek the cooperation of the spiritual guide of the parties; it should also suggest medical, psychiatric and psychological services when required.

In conducting such conciliatory sessions, the court might establish a divorce clinic by inviting every person contemplating divorce action to sit in any divorce court and watch a preview of what is to come through public

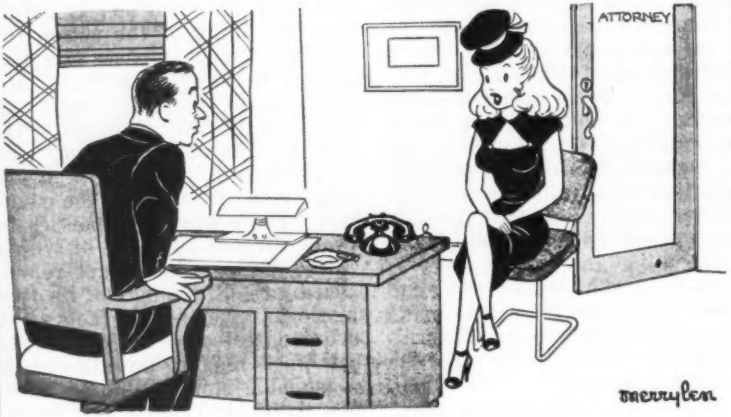
court proceedings. There they would get a true picture of the effects of misconduct, of the sacrifies and suffering that divorce action brings. They would realize that arrangements for the custody of children are never satisfactory; that there is immeasurable strain upon paternal affection; that influence over the children will wane; that the children often become surly, nonconforming and incorrigible, as there is no substitute for normal home life. This clinic could make it much easier for the Chancellor to reason effectively with the potential divorcees.

Exertion of the proper influence, at the moment when the married couple is on the verge of giving up, could, in a considerable number of cases, check the separation. The greatest influence in that respect is the judge, clothed with a new measure of authority. The problem has always been in bringing the judges into the case in time, before the strain of a public accusation has been added to the dissolving union. Unless a solution is found to this problem, no help can come from the court. If the parties had to obtain leave of court to file, the judge would be put in a position where he could first require a discussion with the parties. Judicial machinery of conciliation would thus be set in motion before the irreparable harm is done. This could be written into the law by the simple process of a Supreme Court rule, or an act of the Legislature, not restricting but merely deferring the filing of the action for 60 days, except in cases of emergency, to afford the State, admittedly an interested party, an opportunity to safeguard its rights. The validity of such rule or legislation, I believe, is firmly established throughout the country. There are three parties to every divorce suit, one of which is the State. The Court representing the State, may of its own motion, investigate facts not even contested by the parties; it certainly should be allowed a reasonable time to inquire into the respective rights and interests of all concerned, and particularly of the children who may become dependents.

The plan which I propose is not offered as a complete solution to the divorce problem. I do most emphatically believe, however, that the established agencies of government can lend their efforts and abilities within constitutional bounds, to a constructive endeavor to prevent the disintegration of families, through the medium of a conciliation process, before the actual complaint is filed.

That, and only that, is the purpose of the proposed plan. That it will operate effectively is my firm personal conviction, based upon an actual experiment which I conducted with the consent and approval of the members of my Court.

The proposed plan, in sub-



"You'd better rush my breach of promise suit—the man who jilted me is already 93 years old!"

stance, prescribes a required "cooling off" period *in advance* of the filing of the complaint. It provides for the filing of a confidential "statement of intention" to institute a suit without any allegations of grounds relied on and for a subsequent waiting period of 60 days as condition precedent to the filing of a complaint. Exceptions will be permitted in cases of emergency. During the waiting period the impartial services of the court will be freely available to the parties, on a purely voluntary and confidential basis, for the purpose of securing an amicable adjustment of the difficulties and a permanent conciliation.

Judge and Jury

"The better practice is to decline charging refined speculations, and give only coarse, sharp-cut law. What shall come to the jury as evidence is for the court. What it is worth when it arrives is for the jury. They can discern its true value with spare assistance from the bench. The judge may well assume that they have a fair aptitude for their share of the common business." Moughon v. State, 57 Ga. 102, per Bleckley, J.

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That First Interview

By CHARLES C. ARADO
of the Chicago Bar

✦

Reprinted from Chicago Bar Record,
March, 1949

AFTER a two-hour interview with his client, a defending lawyer knows:

The defendant's age, nationality and religion, his physical appearance and mental characteristics.

Whether he has previously been charged with or convicted of a crime.

Early church influence as well as attendance in recent years.

The extent of his education and record while in school.

His participation in sports, hobbies and social affairs during adolescence.

His employment history including nature of duties and reasons for leaving each job.

Employment status at the date of his arrest together with the attitude of his employer toward him.

Defendant's financial condition and ability to meet demands. (In a property crime, jurors will consider the occasion for its commission.)

The family history; home conditions; pursuits of father, brothers and sisters.

Whether any member of his family has been involved in criminal charges.

Defendant's marital status; health of wife and children; their regard for him.

Medical and psychiatric history of defendant and members of his family.

The existence of chronic alcoholism in the defendant or members of his family.

Factual relation of the defendant to the charge in the indictment.

Nature of his arrest; what he was doing at that time.

Confession or admissions against interest made to police and prosecuting authorities.

Chief witnesses for the prosecution.

Names and addresses of the main defense witnesses.

Based upon the information learned in this interview, the defense lawyer gains first impressions of:

The plea that will be proffered by the defendant.

Factual circumstances consistent with the State's contentions.

Controversies of law which will arise during the presentation of evidence.

Approach to be used in challenging the admissibility of seized evidence, a dying declaration, or a confession.

Extent of factual investigation which will have to be undertaken.

Defense that will be interposed.

Likelihood of waiver of felony charge by the prosecutor.

Legal and equitable aspects for probation in the event of no legal defense.

Type of judge most likely to entertain the specific contention made in behalf of the defendant.

Type of jurors to be selected upon a not-guilty plea.

Motions to be made before, during, and after trial.

Emotional factors which will aid the prosecution as well as defense in a hearing before the judge or a jury.

Ability of the State to establish a case which will withstand a motion for a directed verdict.

Defendant's personality and demeanor upon the witness stand.

His ability to cope with cross-examination.

Sources of strength in facts for effective cross-examination and direct examination.

Vital issues, the determination of which will lead the jury for or against the defendant.

The part that instructions will play in leading the jury to favor the defendant's cause.

Legal strength of the defense in the event the case must be submitted to a higher court upon review.

From the date of that first interview, these impressions become the stimuli for preparing the defense. When the case is called for trial, the defense lawyer knows whether the facts to be developed by the prosecutor will fit the client's personality or loom violently out of character. No one participating in the trial knows the defendant as well as his lawyer. This psychological insight is the defense's "wild card" throughout the trial.

Rule in Shelley's Case

The rule in Shelley's Case is the "Don Quixote" of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous." Stamper v. Stamper, 121 N. Car. 251, 28 S. E. Rep. 20, per Douglas, J.

Sermon in Court

"More instructive lessons are taught in courts of justice than the church is able to inculcate. Morals come in the cold abstract from the pulpit; but men smart under them practically when juries are the preachers." Kendrick v. McCrary, 11 Ga. 603, per Lumpkin, J.

Among the New Decisions

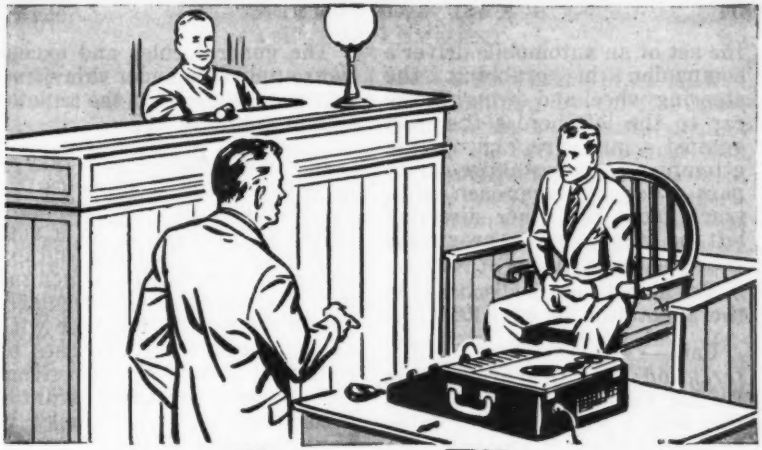
Automobile Insurance — *illegal use of car.* An interesting insurance question was decided by the Colorado Court in Acme Finance Co. v. National Insurance Co., — Colo —, 195 P2d 728, 4 ALR2d 131, opinion by Chief Justice Burke. It was there held that the owner of a mortgaged automobile, insured against damage by impact "while being used for business or pleasure," joined with others in perpetrating a crime and permitted one of his confederates to use the car as a "getaway." In doing so, he wrecked it beyond repair. In an action by the mortgagee against the insurer, it was held that the owner, in permitting his confederate to use the car, was not using it "for business or pleasure," and consequently that the loss was not covered by the insurance; and that if the policy could be otherwise construed it would be unenforceable as against public policy.

The annotation in 4 ALR2d 134 discusses the question "Insurance as covering automobile while being used for illegal purpose."

Automobiles — *pedestrian's duty as to traffic regulations.* Justice Spratley in Crouse v. Pugh, 188 Va 156, 49 SE2d 421, 4 ALR2d 1242, wrote the opinion holding that whether failure of a pedestrian, struck from behind by a car while walking at night along a highway, to comply with a statute requiring pedestrians to keep as nearly as reasonably possible to the extreme left edge, was the remote or proximate cause of injury, held a question for the jury.

An extensive annotation in 4 ALR2d 1253 discusses "Failure to comply with statute regulating travel by pedestrian along highway as affecting right to recovery."

Automobiles — *wreck of car by act of passenger.* It was held in Robinson v. Butler, 226 Minn 491, 33 NW2d 821, 4 ALR2d 143, opinion by Justice Knutson, that



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the act of an automobile driver's companion in grabbing the steering wheel and swinging the car to the left across the road against a guy wire, and not the attempt of an overtaking car to pass when the approach of a truck from the other direction left no room, is the proximate cause of the resulting injury.

The above point is discussed in the annotation in 4 ALR2d 147.

Bail — *imprisonment for different offense.* In Ward v. State Ex Rel. Carman, — Okla —, 196 P2d 856, 4 ALR2d 436, opinion by Justice Corn, it was held that the fact that the principal is arrested by and in custody of Federal authorities for a crime committed after his release on appearance bond to the state does not excuse his sureties from liability on the bond.

The annotation in 4 ALR2d 440 discusses "Discharge, suspension, or remission of bail by reason of imprisonment of principal for a different offense."

Bankruptcy — *interest on preference.* In Waite v. Second National Bank, 168 F2d 984, 4 ALR2d 322, opinion by Circuit Judge Sparks, it was held that interest on the amount of a preferential payment recovered by a trustee in bankruptcy should be allowed from the date of demand for restitution, or, if there was no demand, from the date of commencing action, and not from the date of the payment.

The general rules and exceptions applicable under this situation are discussed in the annotation in 4 ALR2d 327.

Bills and Notes — *guaranty of punctual payment at maturity.* A guaranty of "the punctual payment at maturity" of a note does not cover the costs and expenses of collection for which the note stipulates, particularly where the words "together with all legal and other expenses of collection" were stricken from the guaranty by the guarantor before signing it. Krinsky v. Leventhal, 323 Mass 160, 80 NE 2d 477, 4 ALR2d 136, opinion by Justice Lummus.

The annotation in 4 ALR2d 138 discusses "Guaranty of payment at maturity as covering expense of collection."

Children — *award of child with domicil in another state.* The Texas Supreme Court, opinion by Judge Garwood, held in Wicks v. Cox, — Tex —, 208 SW 2d 876, 4 ALR2d 1, that the Texas court held to have jurisdiction of habeas corpus proceeding against mother domiciled in Texas to determine custody of child present in Texas through mother's ruse, although child is domiciled in Virginia.

An extensive annotation in 4 ALR2d 7 reviews all the authorities on the question "Jurisdiction to award custody of child having legal domicil in another state."

Divorce — *admission of infidelity.* Justice Wilkins of the Massachusetts Supreme Court wrote the opinion in Sayles v. Sayles, 323 Mass 66, 80 NE2d 21, 4 ALR2d 564. It was there held that evidence of a wife's statement to a third person that another than her husband was the father of her child is admissible in a divorce action on the issue of her adultery.

An interesting annotation on the question "Admissibility in divorce action for adultery of wife's statement that husband was not father of her child" appears in 4 ALR2d 567.

Divorce — *res judicata of denial of divorce in another state.* The Florida Court in Gordon v. Gordon, — Fla —, 36 So2d 774, 4 ALR2d 102, opinion by Justice Hobson, held that a dismissal on the merits of a divorce action brought by a wife in a sister state upon charges of indignities to her person, is, under the full faith and credit clause, res judicata of the issues raised in the wife's suit for divorce on the ground of extreme cruelty, where the character of the evidence produced is essentially the same as that relied on in the suit in the sister state.

The circumstances under which such judgments are a bar to proceedings in other states are set out in the annotation in 4 ALR2d 107.

Divorce — *restitution of property.* In Levine v. Levine, — Ga —, 49 SE2d 814, 4 ALR2d 1205, opinion by Chief Justice Duckworth, a husband against whom his wife had instituted proceedings for a divorce with alimony, on the ground of cruelty, obtained, before the case had been brought to trial, an order requiring the wife, as a condition of further prosecuting the suit, to reconvey to him property which he alleged he had conveyed to her in consideration of their reconciliation after a previous act of cruelty.

It was held that the order was appealable although there had been no trial of the case; that the husband, having violated the condition of the reconciliation, was not entitled to restitution; and that in any event the trial judge was without authority to make the order.

The title of the annotation in 4 ALR2d 1210 is "Restitution of property conveyed in consideration of previous reconciliation, as condition of entertaining divorce action."

Elections — *several structures in one bond issue.* In Kellams v. Compton, — Mo —, 206 SW 2d 498, 4 ALR2d 612, opinion by Commissioner Barrett, it was held that submission to voters of the question whether a school district should issue bonds in an amount specified, for the purpose of constructing athletic field bleachers, a high school building, and an elementary school building, is not objection-

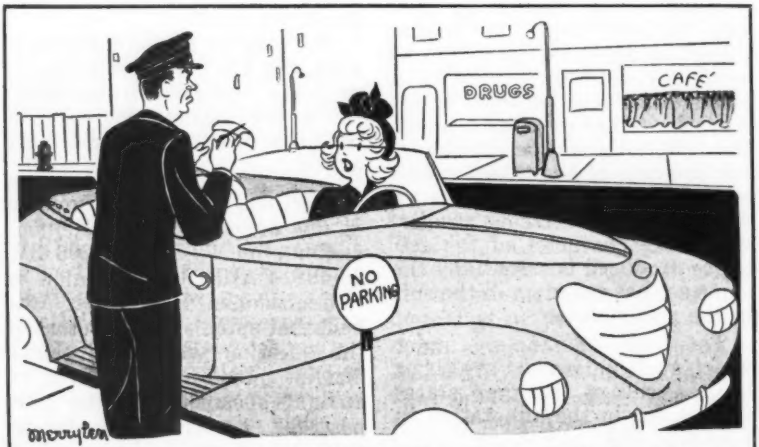
able as combining unrelated projects.

The title of the annotation in 4 ALR2d 617 is "Validity of submission of proposition to voters at bond election as affected by inclusion of several structures or units."

Evidence — *res ipsa loquitur as to containers.* An interesting application of the doctrine of res ipsa loquitur appears in the case of Soter v. Griesedieck Western Brewery Co., — Okla —, 193 P2d 575, 4 ALR2d 458. Justice Bayless wrote the opinion holding that doctrine of res ipsa loquitur is not applicable to bursting of bottle of beer, in action against bottler, in absence of showing that bottle was not handled improperly or subjected to unusual atmospheric or temperature changes after it left possession of bottler.

The cases discussing the question "Res ipsa loquitur as applied to bursting of bottled beverages, food containers, etc." are treated in the annotation in 4 ALR2d 466.

Evidence — *transactions between spouses.* The Missouri Court in Brooks v. Brooks, — Mo —, 208 SW2d 279, 4 ALR2d 826, opinion by Commissioner Bohling, held that evidence as to conversations between husband and wife to the effect that they were each to contribute services and to share jointly in a contemplated business venture does



"How long will that ticket allow me to park here?"

not relate to a confidential communication.

See the annotation in 4 ALR 2d 835 on the question "Conversations between husband and wife relating to property or business as within rule excluding private communications between them."

Executors and Administrators — *amount allowable as funeral expenses.* In National Metropolitan Bank v. Joseph Gawler's Sons, Inc., — App DC —, 168 F2d 571, 4 ALR2d 990, opinion by Associate Justice Proctor, a will empowered the executors to pay testator's funeral and burial expenses "in such amount as they may deem proper." Without consulting the executors, cousins of the testator arranged for a funeral at a cost of $3,863. The executors refused to pay the undertaker's bill on the ground that it was unreasonable and without authority. Later they determined upon $1,000 as proper expenditure and paid that sum to the undertaker, who brought action for the balance.

It was held that the discretion conferred upon the executors was not (the estate being solvent) limited by the amount to which priority is accorded by statute to funeral expenses; and that, in the absence of a showing of abuse of such discretion, their determination was conclusive.

The annotation in 4 ALR2d 995 discusses "Amount of funeral expenses allowable against decedent's estate."

Executors and Administrators — *expense of improper appointment.* A practical question was presented in Re Yonk, — Utah —, 195 P2d 255, 4 ALR2d 150, opinion by Latimer, J., where it was held that one accepting erroneous appointment as administrator with notice of probable appeal by one having preferential right of appointment will be treated as a special administrator, and upon his removal he and his attorney are entitled to apportionment of fees, not on basis of proportionate part of duties completed by them, but on basis of reasonable compensation for preserving and protecting estate.

An annotation in 4 ALR2d 160 shows the nature of allowable expenses under improper appointment.

Grand Jury — *presence of outsider in jury room.* An indictment for statutory rape will be set aside where, because of the timidity of the prosecuting witness, her sister was permitted to accompany her into the grand jury room and both were sworn and testified. People v. Minet, 296 NY 315, 73 NE2d 529, 4 ALR2d 386, opinion by Justice Conway.

The subject of an extensive annotation in 4 ALR2d 392 is "Presence in grand jury room of person other than grand juror as affecting indictment."

Income Tax — *alimony payments.* Circuit Judge Clark in Daine v. Commissioner, 168 F2d 449, 4 ALR2d 248, prepared the opinion holding that a valid obligation is imposed by a husband's agreement to provide separate maintenance for his wife does not, in the absence of a court decree requiring such payments, or a written instrument incidental to a decree of divorce or separation, render them deductible by the husband under sections 22 (k) and 23 (b) of the Internal Revenue Code in determining a taxable income.

The involved question of income tax on alimony payments is discussed fully in the annotation in 4 ALR2d 252.

Instructions — *belief in testimony.* In an action for injury to a child run over by a backing locomotive, in which the engineer, who was defendant's principal witness and the only witness who saw the accident, testified that he was keeping a proper lookout and that as soon as he recognized that an object, which he first saw on the track a few seconds before the accident, was a baby, he applied the independent brake, sanded the rails, and reversed the engine, but the evidence as to the presence of sand on the track after the accident was conflicting, and the engineer's testimony that he did not wave at two boys in a near-by field was contradicted by two of them, it is prejudicial error for the court to tell the jury that if they think that a witness testifies falsely on something they need not believe him on anything, so that if they believe the engineer said that he sanded the rails, knowing that he did not do so, they would not have to believe anything he said. Virginian Railway Co. v. Armentrout, 166 F2d 400, 4 ALR2d 1064, opinion by Circuit Judge Parker.

The annotation in 4 ALR2d 1077 discusses "Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus."

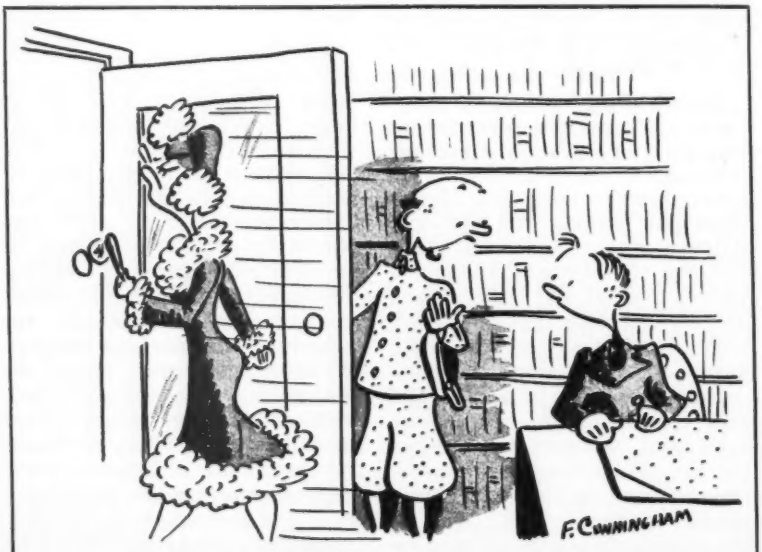
Insurance — *questions showing defendant covered by liability insurance.* The Illinois Court in Wheeler v. Rudek, 397 Ill 438, 74 NE2d 601, 4 ALR2d 748, opinion by Justice Murphy, held that an affidavit stating that numerous persons were employed by a liability insurer at its local office and as investigators, agents, etc., and that affiant had "reasonable grounds for believing" that persons interested in the insurer might be among the jury panel called, without stating what those grounds were, is not sufficient to warrant voir dire examination of prospective jurors respecting their connections with liability insurance companies. The title of the annotation in 4 ALR2d 761 is "Admissibility of evi-

dence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in personal injury or death action carries liability insurance."

Insurance — *water damage insurance.* Circuit Judge Collet, in World Fire and Marine Insurance Co. v. Carolina Mills Distributing Co., 169 F2d 826, 4 ALR2d 523, wrote the opinion holding that the breaking of a basement "house trap" from back pressure of an overloaded city sewer is an independent cause of the resulting water damage within the purview of an exception of a water damage policy excluding liability for losses "directly or indirectly" by floods, inundation, and backing up of sewers or drains.

All cases treating the question "Damage within coverage of water damage insurance" are covered in the annotation in 4 ALR2d 532.

Jury — *peremptory challenge to a race.* In Hall v. United States, — App DC —, 168 F2d 161, 4 ALR2d 1193, opinion by Associate Justice Wilbur K. Miller, in selecting members of



"Madame doesn't care for the common law."

a jury to try three Negroes charged with the homicide of a white man whom they were attempting to hold up, the prosecution peremptorily challenged such Negroes as were in the jury panel. Two judges of the Court of Appeals held that the exercise of peremptory challenges to exclude Negroes from the jury did not violate any constitutional right of defendants. The third judge thought that exclusion by peremptory challenge was as much a denial of due process as systematic exclusion of Negroes from the venire would have been.

The main point in this case is annotated in 4 ALR2d 1200.

Marriage — *cohabitation after learning of impediment.* In Otte v. Pierce, 118 Colo 123, 194 P2d 331, 4 ALR2d 536, opinion by Justice Hays, it was held that one who, after learning that the woman whom he had married on her representation that a previous marriage had been dissolved by divorce, continued to live with her for six months and instituted a suit in equity for annulment just before her interlocutory decree of divorce from her legal husband became final, is precluded from maintaining the suit, both on the ground of "unclean hands" and on the ground of an adequate remedy at law by action for a divorce. The annotation in 4 ALR2d 542 discusses "Cohabitation of persons ceremonially married after learning of facts negativing dissolution of previous marriage of one, as affecting right to annulment."

Marriage — *use of contraceptive.* The English case of Baxter v. Baxter (1948) AC 274, 4 ALR2d 216, an opinion by the English House of Lords, holds that a wife's continued and persistent refusal to have sexual intercourse with her husband unless he wore a contraceptive sheath does not entitle the husband to a decree of nullity on the ground of "wilful refusal to consummate the marriage," authorized by statute.

The annotation in 4 ALR2d 227 discusses "Avoidance of procreation of children as ground for divorce or annulment of marriage."

Master and Servant — *demotion or change of duties.* In Mair v. Southern Minnesota Broadcasting Co., — Minn —, 32 NW2d 177, 4 ALR2d 273, opinion by Justice Magney, it was held that discharge of one employed for a fixed term as general manager of a radio broadcasting station under a contract stating that the duties to be performed by the general manager are those which usually appertain to such employment is, as a matter of law, not justified by his noncompliance with an order of the board of directors to appoint a certain person as assistant manager through whom all orders should be issued and by whom expenditures must be

approved, and to post a notice of such person's appointment and authority.

The title of the annotation in 4 ALR2d 276 is "Reduction in rank or authority or change of duties as breach of employment contract."

Municipal corporations — *differential in rates between inhabitants and noninhabitants.* A sewer system serving a city and outlying districts, constructed by the city at its expense, was turned over to a newly created sewer district which, in the exercise of its statutory authority, prescribed a rate schedule for the use of the sewers by which a greater service charge was imposed on users outside, than on users in, the city. The fact that the cost of the system, represented by outstanding sewer bonds, was being paid from city taxes was held to constitute a differential having a reasonable relationship to the ground of classification. The reasonableness of the amount of the higher rate to be paid by the users outside the city was not presented by the appeal. Louisville & J. C. M. S. D. v. J. E. Seagram & Sons, 307 Ky 413, 211 SW2d 122, 4 ALR2d 588, opinon by Commissioner-Stanley.

The annotation in 4 ALR2d 595 discusses "Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates."

Oil and Gas — *waste of oil and gas.* The Texas Supreme Court in Elliff v. Texon Drilling Co., — Tex —, 210 SW2d 558, 4 ALR2d 191, opinion by Justice Folley, held that in a state where landowners are regarded as having absolute title in severalty to oil and gas in place beneath their land, subject to the right of adjoining owners to drain them away through wells on their own land, one who negligently permits a gas well to get out of control is liable to an owner of lands overlying the common reservoir for the resultant waste of gas and distillate, even though such waste occurs after the gas and distillate have been drained from beneath plaintiff's land.

The title of the annotation in 4 ALR2d 198 is "Rights and remedies of owner or lessee of oil or gas land or mineral or royalty interest therein, in respect of waste of oil or gas through operations on other lands."

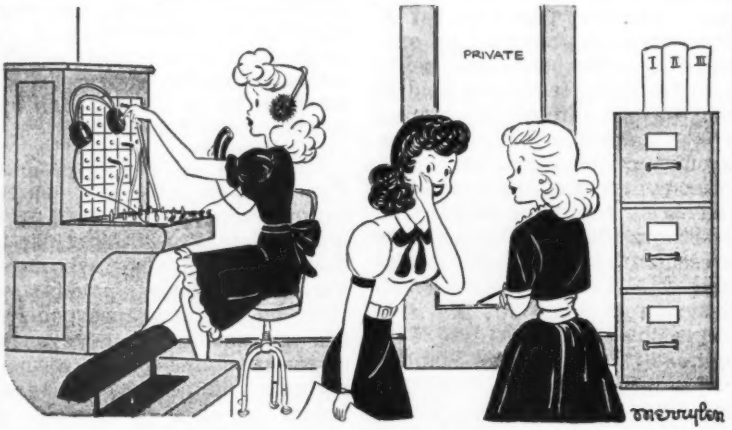
Receivers — *in tort actions.* Persons who have tort claims against alleged insolvents owning a mortgaged building partly destroyed by fire and who have garnished moneys payable to them on fire insurance policies, are not entitled to have a receiver appointed to enforce their right to compel the mortgage holder to elect or satisfy its claim out of either the real estate or insurance money, thus leaving the other available to the petitioners, or on the ground that the

damaged building is deteriorating through not being repaired, where a defendant transferee proposes to preserve it and offers to give a bond for all the funds involved and to insure the preservation and protection of the building. Irwin v. Willis, 202 Ga 463, 43 SE2d 691, 4 ALR2d 1265, opinion by Presiding Justice Duckworth.

The annotation in 4 ALR2d 1278 discusses the question of receivership in tort actions.

Restrictive Covenants — *change in neighborhood.* In Norris v. Williams, — Md —, 54 A2d 331, 4 ALR2d 1106, opinion by Justice Delaplaine, the grantor of part of a tract of land covenanted that a portion retained should, for a period of fifty years, be used for residential purposes only. After thirty years the growth of the town and the occupancy of land across the street for business purposes had defeated the purpose of the parties to make the locality a suitable one for residences. The property having been sold on condition that it should prove available for commercial uses, the question whether the restriction had ceased to be enforceable was raised by a suit for specific performance.

It was held that the court could in the specific performance



"The boss caught her listening in on telephone conversations."

suit remove the encumbrance as a cloud on title; that the fact that the restriction was for a fixed term did not preclude its earlier removal; and that the circumstances warranted such removal.

A seventy page annotation in 4 ALR2d 1111 dicusses "Change of neighborhood in restricted district as affecting restrictive covenant; decisions since 1927."

Sale — *delivery of property in possession of third person.* A provision of the Uniform Sales Act was construed in B. A. Griffin Co. v. Northwestern Fish & Seafood Co., 226 Minn 497, 33 NW2d 838, 4 ALR2d 208, opinion by Justice Magney. It was held that acts of a storage company with which the subject of a sale was stored, in transferring on its books the storage account, at the seller's instance, into the name of the buyer, and thereafter billing the buyer for storage, held a sufficient delivery to satisfy a statutory requirement that the obligation of the seller of goods in a third person's possession is not fulfilled unless and until such third person acknowledges to the buyer that he holds the goods in the buyer's behalf.

The annotation in 4 ALR2d 213 discusses "What amounts to acknowledgment by third person that he holds goods on buyer's behalf within statutory provision respecting delivery when goods are in possession of third person."

Sale — *secreted valuables.* An administrator sold personal effects of a decedent at auction. For the purpose of the sale the auctioneer arranged the less valuable articles in parcels open to buyers' inspection, one of which was a box of clothing. The auctioneer announced that on the sale there would be no comebacks and that nothing was guaranteed except title.

The purchaser of the box of clothing discovered in a pocket two rings, one of which was worth $2,500. It was held that as the supposed subject of sale was clothing, title to the rings did not pass to the purchaser, notwithstanding the auctioneer's assurance that purchasers would get good title to their purchases. American National Bank v. West, — Tenn App —, 212 SW 2d 683, 4 ALR2d 314, opinion by Justice Felts.

The title of the annotation in 4 ALR2d 318 is "Title to unknown valuables secreted in articles sold."

Taxation — *goods shipped on consignment.* According to the Indiana Court in Gross Income Tax Division v. Quick, — Ind —, 78 NE2d 871, 4 ALR2d 238, opinion by Justice O'Malley, the proceeds of recurring shipments of cattle and hogs to commission merchants in another state for sale are not subject to a state gross income tax from which the proceeds of sale in interstate commerce are exempt.

The annotation in 4 ALR2d 244 discusses "State tax on or in respect of goods shipped in interstate commerce to consignee for sale on consignor's account without previous sale or order for purchase."

Unemployment Compensation Act — *successive employers.* Justice Ells wrote the opinion in Harris v. Egan, 135 Conn 102, 60 A2d 922, 4 ALR2d 717. It was held that a statutory provision subjecting to assessment for unemployment compensation an employer not previously subject who acquires "substantially all of the assets, organization, trade or business of" another employer who is subject, applies to one who has acquired the land, buildings, equipment, stock in trade and good will of another, although such other retains his accounts receivable and the purchaser employed only one of the seller's employees for a week to give instructions in the operation of the machinery.

The annotation in 4 ALR2d 721 discusses "Constitutionality, construction, and application of provision of Unemployment Compensation Act subjecting to its provisions an employer purchasing or succeeding to the business of another employer."

Wills — *partial exercise of power of appointment.* Justice Spalding in Welch v. Morse, — Mass —, 81 NE2d 361, 4 ALR 2d 913, wrote an opinion holding that under a testamentary trust giving the life beneficiary power on his death to appoint the income to his wife and the principal to his issue and providing for payment of the whole trust fund to designated institutions if the beneficiary left no such appointees the donee may validly appoint the income to his wife, leaving the principal wholly unappointed.

The annotation in 4 ALR2d 919 discusses "Partial exercise of power of appointment."

Wills — *what constitutes oil and gas royalties.* The Mississippi Court in Palmer v. Crews, — Miss —, 35 So2d 430, 4 ALR 2d 483, opinion by Justice McGehee, held that a bequest by a testator who owned royalties payable under oil and gas leases in Texas and Louisiana, and oil and gas leases on and mineral interests in undeveloped property in Mississippi, and who had bequeathed to his wife "all my royalties," and to a brother "all of my oil interests in Caddo Parish, Trees City and elsewhere if any," held not to extend to the Mississippi leases and mineral interests.

The title of the annotation in 4 ALR2d 492 discusses "What constitutes oil or gas 'royalty,' or 'royalties,' within language of conveyance, exception, reservation, devise, or assignment."

Mr. Justice Holmes

By ISIDOR ENSELMAN
OF THE NEW YORK CITY BAR

"How forcible are right words!" (Job VI, 25.) The words and phrases of Justice Holmes are not only full of wisdom, they have wings. They fire the trains of ideas that pass through the mind. His writing is punctuated with precious gems of thought and fragrant flowers of speech. His liberal philosophy is timeless, and what he wrote will live as long as English prose has the power to thrill. And with it all, his style is neither labored nor obscure. "The delusive ease of great effort and great art" is how Justice Frankfurter characterized his writing. In 1931, Chief Judge Cardozo said: "Many a time, in turning the pages of an opinion devoted to a humdrum theme, some problem perhaps of contract or of negligence, I have come across a winged sentence that seemed with its wings to chase obscurity away. Curiously, I have gone back to the beginning, to find the name of Holmes." (44 Harvard Law Rev. 690.)

The following are a few of his more familiar expressions.

Excerpts from Opinions

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used" (Towne v. Eisner, 245 US 418, 62 L Ed 372, 38 S Ct 158).

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." (Schenck v. U. S., 249 US 47, 63 L Ed 470, 39 S Ct 247.)

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." (Abrams v U. S., 250 US 616, 63 L Ed 1173, 40 S Ct 17.)

". . . but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—

not free thought for those who agree with us but freedom for the thought that we hate." (U. S. v. Schwimmer, 279 US 644, 73 L Ed 889, 49 S Ct 448.)

"Delusive exactness is a source of fallacy throughout the law." (Truax v. Corrigan, 257 US 312, 66 L Ed 254, 42 S Ct 124, 27 ALR 375.)

"The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure it or at least to make the evil less." (Liggett Co. v. Baldridge, 278 US 105, 73 L Ed 204, 49 S Ct 57.)

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides." (Noble State Bank v. Haskell, 219 US 104, 55 L Ed 112, 31 S Ct 186.)

"The power to tax is not the power to destroy while this court sits." (Panhandle Oil Co. v. Mississippi, 277 US 218, 72 L Ed 857, 48 S Ct 451, 56 ALR 583.)

In a case under the Fourth Amendment involving wire-tapping, Justice Holmes said "We have to choose, and for my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part . . . . If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed" (Olmstead v. U. S., 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376).

In sustaining the constitutionality of a Virginia statute providing for sexual sterilization of inmates of institutions supported by the State found to be with a hereditary form of insanity and imbecility, Justice Holmes said "Three generations of imbeciles are enough" (Buck v. Bell, 274 US 200, 71 L Ed 1000, 47 S Ct 584).

Other Excerpts

"The other day my dream was pictured to my mind. It was evening. I was walking home-

ward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the Götterdämmerung will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars." (At a dinner of Harvard Law School Association of New York on Feb. 15, 1913.)

"The flag is but a bit of bunting to one who insists on prose." (On 100th anniversary of day on which John Marshall took his seat as Chief Justice.)

"To have doubted one's own first principles is the mark of a civilized man." (Ideals and Doubts, Illinois Law Rev., vol. x, 1915.)

"Certitude is not the test of certainty. We have been cocksure of many things that were not so." (Natural Law, Harvard Law Rev., vol. XXXII, 1918.)

"For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end." (The Profession of the Law, delivered to undergraduates of Harvard University on Feb. 17, 1886.)

The Visit

Is it any weakness to be wrought on by such writing? Not content with mere reverence, I experienced, to use his words, "a kind of hydraulic pressure" (Northern Securities Co. v. United States, 193 US 197, 401) to have some personal contact with the man. The only

thing I could think of was for him to autograph my copy of his "Collected Legal Papers." All of this went through my mind. But when it came to doing something about it, I hesitated. As the years rolled by I became more and more panicky. Finally, when Justice Holmes arrived at the age of 89 years (March 8, 1930), I was stirred to action.

In answer to my letter to the Justice, I received a handwritten letter, dated March 24, 1930, as follows:

"My dear Mr. Enselman,

Mr. Justice Holmes requests me to tell you that he will be pleased to sign a copy of his 'Collected Legal Papers' whenever it is presented to him. He adds that you can spare yourself a journey to Washington by mailing the book to him.

Yours sincerely,
Alger Hiss
Secretary to Mr. Justice Holmes"

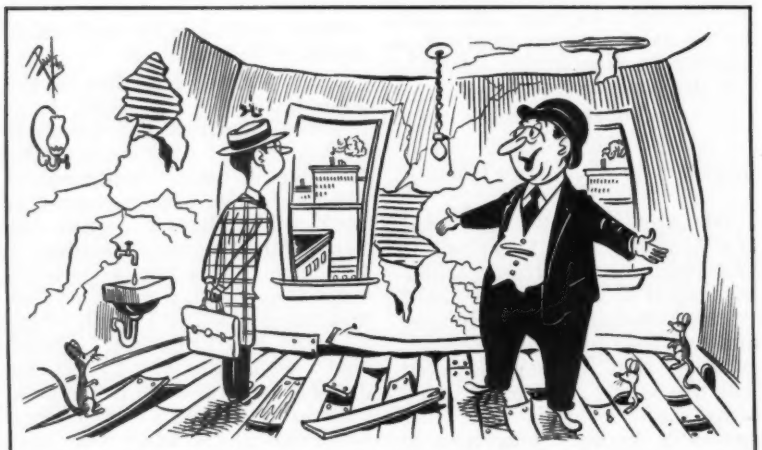
On April 4, 1930, my wife, our daughter and I arrived in Washington. Saturday morning, April 5, 1930, I telephoned to the home of Justice Holmes, and was told by a lady who answered, that no appointment was necessary, and that I could come right over if that was agreeable to me. I arrived at his home, No. 1720 Eye Street, N.W., at about 11:30 A. M., and was welcomed by his housekeeper. I gave her the book which was to be inscribed and also a brief which I had written, discussing certain hypocritical aspects of the usury law as applied to modern business. As I waited, I observed an abundance of fresh flowers and several singing birds. The spirit of youth was in the air.

In a little while Mr. Hiss, his secretary at that time, came down and asked me to come upstairs, as the Justice wanted to see me. I had secretly hoped for such an invitation, but was flabbergasted when it was tendered. When I reached the head of the stairs, I was introduced to the Justice, who was standing, a little bowed with the burden of eighty-nine years, and with his hand extended to greet me. I walked over briskly and shook hands with him.

I had written my name on the fly-page, as is my habit, as a mark of identification. I did not dream when I did this that the time would come when I would ask the Justice to autograph this book. The Justice signed his name directly under mine. I told him that I blushed at the sequence. The Justice smiled and asked whether I wanted him to write anything else. I said that I would like him to add the date because I always would look back to the day as a very memorable one in my life. The Justice said that it was kind of me to say that, and added the date—April 5, 1930.

I then told the Justice that I was anxious to show my grati-

tude, but could think of nothing appropriate, except to give him one of my briefs in the New York Court of Appeals, which represented the best I could do in that case. I added that I did so with a sense of reluctance because he might regard it in the nature of punishment. The Justice quickly said "Oh, no, what is it about?" When I told him it involved the usury law, he asked me what the New York rule was. I told him that generally the principal is forfeited for usury. He said, in substance, "That is very drastic. You know Jeremy Bentham said that usury laws do more harm than good; or as I put it, usury costs more than it is worth." He said that he wrote on that subject long ago. With that he arose, went to his open book shelves, which covered the four walls from floor to ceiling, and picked out a book containing his opinion in Otis v. Parker, 187 US 606, 608–609, written in 1903. In the margin of the opinion written in his handwriting was the epigram "Usury costs more than it is worth." I was just about struck dumb with the Justice's alertness and memory. When I recovered, I said "I suppose that you make marginal notations so as to have all the law on the



"Now here's a nice little office for your first few years of law practice . . . since you ain't gonna have any clients anyhow!"

subject in one place." Quick as a flash came the answer "Not all the law—all the law I know."

Many years afterward, when I told Justice Jackson's son William about this experience, he suggested that I might have replied with the question "What's the difference?" In the first place, even if this bright remark had occurred to me, I doubt whether I would have dared to say it. In the second place, I was somewhat intoxicated with Justice Holmes' brilliance and modesty.

Finally, I told the justice that I could not avoid thinking of Rupert Brooke's satirical poem entitled "Heaven" when I read his essay on Montesquieu, in which he referred to the latter's "*Lettres Persanes*" in which Usbek asked the "sublime dervish" Gemchid whether he thought the Christians are to be damned forever for not having embraced the true religion of which they never had heard. The Justice said that he had read some of Brooke's poems, but he did not recall having read "Heaven". I quoted a few lines which I remembered:

* * *

"Fish say, they have their
Stream and Pond;
But is there anything Beyond?
This life cannot be All, they
swear,
For how unpleasant, if it were!
One may not doubt that, somehow, Good
Shall come of Water and of
Mud;
And sure, the reverent eye must
see
A purpose in Liquidity.

* *

But somewhere, beyond Space
and Time
Is wetter water, slimier slime!

* * *

Oh! never fly conceals a hook,
Fish say, in the Eternal Brook."

* * *

The Justice seemed pleased, and I promised to mail the poem to him.

The interview was closed with my heartfelt thanks for his kindness in giving me so much of his time. As I left, I had mixed feelings of pride and humility. I respected Justice Holmes, and loved my Country more than ever before.

Shortly after that I sent Brooke's "Heaven" to the Justice, and I received a letter as follows:

"My dear Mr. Enselman:

Your letter containing the Rupert Brooke poem came this morning. The Justice was not familiar with it and was quite delighted by it.

I have always thought it one of the very few of Brooke's things that weren't marred by some egotism or transcendental sentiment.

Thank you so much for sending it on.

Yours sincerely,
Alger Hiss

April 12, 1930"

RADIO SYMPOSIUM

I heard Justice Holmes' voice for the last time on March 8, 1931, his ninetieth birthday. After listening to the tributes paid to him in the radio addresses of Chief Justice Hughes and other speakers, he said:

"In this symposium my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task.

"But I may mention one thought that comes to me as a listener-in. The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voices of friends and to say to one's self: 'The work is done.'

"But just as one says that, the answer comes: 'The race is over, but the work never is done while the power to work remains.'

"The canter that brings you to a standstill need not be only coming to rest. It cannot be while you still live. For to live is to function. That is all there is in living.

"And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago:

" 'Death plucks my ears, and says Live—I am coming.' "

SUMMER OF 1934

In the summer of 1934, I sent to Justice Holmes an article I wrote, and I received the following acknowledgment:

"Beverly Farms
Massachusetts
20 August, 1934

My dear Mr. Enselman—

Mr. Justice Holmes has asked me to acknowledge for him the receipt of your little pamphlet. He has not as yet had a chance to really look at it, but his brief glance has insured his returning to it.

Very truly yours,
Mark DeWolfe Howe
(Secretary to
Mr. Justice Holmes)"

On March 8, 1935, as a mark of undying gratitude for all that he has meant to me and out of deep respect for his memory, I attended the simple but dignified funeral service at All Souls Unitarian Church in Washington. As my eyes followed the procession, I thought of the words of Horatio upon the death of Hamlet:

"Good night sweet Prince;
And flights of angels sing thee
to thy rest!"

Political Rebuilding

I have of late seen too much of political rebuilding, not to have observed, that to demolish is not the shortest way to repair.—*John P. Curran*

Hit and Run Insurance

By SYDNEY ROTHSTEIN

A RECENT statute of Ontario seems to solve a puzzle which has troubled legislators in the United States ever since the number of auto accidents began increasing. The puzzle is in two parts: First, how to compensate innocent hit-and-run victims, and second, how to provide for auto victims who have a judgment against the driver, but can't satisfy it because the driver is too poor to pay.

To meet this problem, Ontario passed amendments to its Highway Traffic Act in 1947 and 1948 (Highway Traffic Act R. S. O., 1937, c. 288; as amended by adding s. 93 in Statutes of Ontario, 1947, p. 170 and 1948, p. 144) setting up an Unsatisfied Judgment Fund, created by payments up to one dollar by drivers getting or renewing their license. Under the statute, if an auto accident victim can prove that he can't find the hit-and-run driver *and* that the driver would have been liable if found; or that he is unable to satisfy his judgment, he can sue the Registrar of Motor Vehicles and recover from the Fund.

Oddly enough this statute has had almost no comment in the United States although it appears to be one which might well be copied. There have been suggested three other methods of assuring compensation to innocent victims of motor vehicle accidents. None of these seems to solve both aspects of the problems as well as the Ontario statute does.

The Auto Compensation Plan is modeled after Workman's Compensation, and was proposed in a *Report by the Committee to Study Compensation for Auto Accidents* to the Columbia University Committee for Research in the Social Sciences (1932). It provides principally that each auto driver take out a compensation insurance from private insurers and that the owner of a motor vehicle be liable for personal injuries caused by the operation of the vehicle, regardless of fault.

Because of the compulsory insurance factor, this plan would clear up the problem of uncollectible judgments. Furthermore claims would be more promptly

paid since inquiry would not be made into fault. In addition, the plan would be handled by an administrative board, affording relief to congested courts.

On the other hand, there are several demerits in the compensation plan.

First, there is no sound reason for abolishing the "negligence" test in motor car accidents. Under the proposed plan a drunken pedestrian or driver, a criminal escaping from the police and knocked down by an auto, would all be given compensation. Second, if the principle upon which compensation is paid is to be changed from fault of the motorist to one of social security to all, then the motorist should not bear all of the cost, which may be quite high. The State should assume all or part of it. Finally the plan might result in many mala fide claims. No English speaking country has adopted this plan.

The second type of legislation is Compulsory Insurance which is in force in Massachusetts, Saskatchewan, England and Australia. The "negligence" test is kept in this type of legislation. As in the Compensation Plan, the compulsory insurance factor would eliminate the problem of unsatisfied judgments. The defect is that insurance rates are high since the insurance companies are required to underwrite risks they would not otherwise accept.

The third type of law is the safety or financial responsibility law in effect in most of the United States and Canada. The main feature here is that a person who is not insured loses his license upon the occurrence of an accident and does not regain it until he both offers security for any judgment which may be declared against him and takes out insurance against future accidents.

Advocates of this form of legislation say it is superior to compulsory insurance in that it promotes safe driving because of the penalties involved, while compulsory insurance has no safety factor. Furthermore it avoids compelling all drivers to insure while encouraging those who can afford it to take out insurance now rather than later when they will have the additional expense of producing security for possible damages. Unfortunately, this type of legislation does not offer any relief for the victim of a driver who is unable to pay a judgment against him, while the Auto Compensation and Compulsory Insurance plans do cover this.

None of the above three methods considers the hit-and-run case, or the case where the car is illegally on the road or from out of state and without insurance.

The first mention of a fund available for victims of hit-and-run drivers was made in Great Britain Command Paper No. 5528 (1937). However, the re-

port discards the idea with the remark that ". . . it would lead to abuse."

In 1944, a committee appointed by the Attorney-General of Manitoba recommended that the great defect in the responsibility type of law, the unsatisfied judgment, could be cured by a Fund. *Manitoba—Report on Indemnity for Motor Vehicles* (1944). But the report did not mention using the Fund for hit-and-run victims.

Finally, in 1947, the Ontario financial responsibility statute was amended to provide for both the unsatisfied judgment and the hit-and-run cases.

Briefly, the act provides:

93a) The Lt. Governor is to manage the Fund and prescribe the amount up to $1 which the operator shall pay in addition to the license fee.

93b) The victim must get judgment, show efforts to get execution and failure to the judge, who then may order him paid not more than $5,000 for injury or death of one person ($10,000 for more than one), and not more than $1,000 for property damage. Insurers cannot take advantage of the Fund.

93bb) 93b doesn't apply where there is judgment by default unless the Registrar is given notice and opportunity to file a defense.

93c) The victim must assign his judgment to the Fund.

93d) The judgment debtor can't get his license or registration back until he has paid the judgment *and* has filed proof of his financial responsibility.

93e-g) Where Victim can satisfy the judge that 1) he can't identify the person or car that hit him, and 2) he would have a cause of action against the owner or driver, then he may bring action against the Registrar and recover as in 93b). Where the auto is in the possession of one without the owner's consent, Victim may apply to the Fund as if identity of the owner had not been established.

93h) If the person is found after the Fund has paid, the judgment shall be deemed to be against him, and the Fund may indemnify itself from him.

The statute seems to be working satisfactorily. The Ontario Statute Citator, 1948, p. 175 reports only three cases litigated under the act. These involved claimants' right to trial by jury where the Registrar is the nominal defendant and whether the Registrar has the burden of proof under the statute. It does not appear that false hit-and-run claims are being made.

Alberta, British Columbia, Manitoba, Ontario and Prince Edward Island now have this type of statute in connection with safety-financial responsibility laws. It seems to be an excellent solution to a problem which has caused much trouble to legislators.

The Proposed New Commercial Code

By MAHLON E. LEWIS
Member of the Allegheny County (Pa.) Bar

Condensed from Pennsylvania Bar Association Quarterly, January, 1949

AS EARLY as 1917 the enactment of a Federal Sales Act was advocated by the National Conference of Commissioners on Uniform State Laws. The American Bar Association approved of such an enactment as early as 1922, and in 1937 considerable pressure was brought upon the Congress of the United States for the enactment of such legislation by the Merchants' Association of New York. Notwithstanding the recognition by individuals and organizations of the legal and commercial merit of such legislation and the support given it, it was not until 1940 that the enactment of a Federal Sales Act became imminent, and there was presented to the Seventy-sixth Congress of the United States H. R. 8176 which was referred to the Committee on Interstate and Foreign Commerce.

It can readily be seen that the enactment of a Federal Sales Act which differed in many particulars from the Uniform Act in effect in about three-quarters of the States would, as contended by the opponents to H. R. 8176, create chaos. This was brought to the attention of the Executive Committee of the National Conference of Commissioners on Uniform State Laws at their mid-year meeting in January, 1940, by Professor George G. Bogert. Largely due to the influence of the Executive Committee of the Conference, the proponents of H. R. 8176 were induced to defer any and all action upon the bill until such time as the Conference could take some action and make some recommendation. At this Annual Meeting it was decided that the preparation of a Commercial Code should be undertaken by the Conference as soon as funds were available.

Although the American Law Institute was at this time considering winding up its affiairs, and although its officials viewed with considerable apprehension the magnitude of the task proposed by the National Conference of Commissioners on Uniform State Laws, the result which would eventually be achieved seemed so desirable that in 1942 an agreement was consummated between the two

organizations for a cooperative effort.

The magnitude of the task may be reflected by the arrangements for financing the work. Originally, it was planned that it should be financed by subscriptions from law firms, lawyers and merchants whose law it would be. The National Conference of Commissioners on Uniform State Laws underwrote the project to the extent of $10,000, which comprised its total resources. Mr. Schnader underwrote it to the extent of $5,000, which sum he later changed to an outright gift. In the early stages of the work the American Law Institute generously devoted its funds to the furtherance of the project.

In planning the Code, its cost was estimated to be upwards of $250,000 and the time required for its completion was estimated to be at least five years from January 1, 1945. A member of the Council of the Institute succeeded in getting the Maurice and Laura Falk Foundation of Pittsburgh to consider an application for this amount. As a result of the Institute's application, a grant was obtained from the Falk Foundation of $50,000 per year for three years, with permission to apply for an additional $100,000 after the completion of two years' work. In view of the uncertainty as to the remaining $100,000, efforts were made to obtain that amount from business and financial concerns and the last information available is that approximately $100,000 has been subscribed.

The justification for an undertaking of this magnitude lies principally in the absence of widely adopted uniform legislation applicable to some phases of commercial activity and the obsolescence of such uniform legislation as has heretofore been widely adopted.

That the lack of a compact statement of generally applicable commercial law impairs the ease and assurance with which business transactions can be carried on across our state and national boundaries needs no argument or extended discussion. Consideration of the proposition that our existing laws are obsolescent and inadequate brings to light some interesting matters.

For example, the development of new means of transportation presents many problems. Air freight alone creates the impossible situation of the goods arriving at their destination before the document of title and the accompanying sight draft by which legal device the seller had heretofore been able to secure payment against delivery.

Judge Herbert F. Goodrich, Director of the American Law Institute, has pointed out other developments in commercial practice, such as the Federal Reserve Bank and the modern clearing house, as being beyond the contemplation of the Negotiable Instruments Act. The Ne-

gotiable Instruments Act further contains many provisions now amounting to nothing more than surplusage because the practices are obsolete, as acceptance and payment for honor.

In short, it appears confirmed that there are now more people engaged in more transactions involving more complex goods and employing more rapid communication and transportation than our present laws are adapted to meet. When there is added to this the total absence of statutory law regulating commerce with foreign nations, the need for a new and uniform commercial code is clearly established.

The organization in which the National Conference of Commissioners on Uniform State Laws and the American Law Institute have joined to meet the need for a new and uniform commercial code is as follows: General supervision is exercised by an Editorial Board, consisting of two representatives from the Institute and two from the Conference, with the Chief Reporter as the fifth member. Reporters and Associate Reporters for each major portion of the Code have been selected by agreement and each organization has designated advisers to represent it in the work of drafting. In addition to these advisers from the Conference and the Institute, provision has been made for the utilization of advisers representing firms or organizations actively engaged in commerce, for it is a fundamental principle of the responsible parties that the Code shall be by lawyers particularly for businessmen and adapted to their needs and readable in their own language.

The Reporters, when a draft is prepared, refer it to the Council of the Institute and the appropriate committees of the Conference respectively. The drafts are then brought before the Conference and before the Institute at their Annual Meetings where they are read, debated and approved or recommended for revision, section by section. This brings the draft to the attention of about 950 outstanding members of the Bar. It has been the practice of the Conference to approve no draft until it has been considered at two Annual Meetings.

The finances of the project are handled by the Institute since it is a nonprofit corporation, not subject to taxation, whereas the Conference is an unincorporated association.

The result of this cooperative effort will be a Commercial Code dealing with the entire scope of commercial law and presently planned to be built upon the following outline:

ARTICLE I: The first Article is entitled "General Provisions, Including Definitions." It will apply to the Code as a whole and will, as the title indicates, contain definitions of terms common to all the Articles, irrespective of their subject matter, as

well as other provisions of general applicability.

ARTICLE II: This is the Sales Article of the Code, constituting essentially an up-to-date revision and expansion of the old Uniform Sales Act, generally in terms of modern commercial case law.

The Article is subdivided into six major parts: Part I deals with matters of General Construction, Application and Subject Matter of the Act; Part II covers Form, Formation and Construction of The Contract; Part III is entitled "Title and Documents of Title, Creditors and Good Faith Purchasers"; Part IV is concerned with Performance; Part V covers Breach and Repudiation; Part VI provides for Remedies of the buyer and seller. All in all this Article contains 133 sections.

ARTICLE III: This Article is entitled "Commercial Paper." It generally covers matters provided for by the Uniform Negotiable Instruments Law with some important departures, however. Thus, sections from the N. I. L. dealing with Acceptance for Honor and Payment for Honor have been eliminated because they are now obsolete practices. N. I. L. sections concerning solely matters of foreign trade, such as Bills in a Set, have been deleted and are covered by the Article dealing with Foreign Banking. Provisions dealing with secured paper and matters relating to corporate securities have also been omitted, they being provided for respectively by the Articles of the Code concerned with Secured Commercial Transactions and Investment Instruments. It is also presently planned to include in this Article matters dealing with Bank Collections.

ARTICLE IV: This Article is concerned with Bank Operations and Foreign Banking. Chapter I deals with Letters of Credit. Chapter II covers Foreign Remittances. Other parts of this Article will cover transfers of large "clean" credits and the regulation of certain bookkeeping practices in international banking which vary from domestic practices.

ARTICLE V: This Article deals with Investment Instruments. It takes out of the present N. I. L. bearer or registered bonds and includes certificates of stock now provided for by the Uniform Stock Transfer Act. It will cover additional types of investment paper, other than paper falling within the scope of Article VII on Secured Commercial Transactions.

ARTICLE VI: Intended originally to cover only bills of lading and warehouse receipts, this Article has been somewhat expanded in scope and is now entitled "Documents of Title." It represents primarily a consolidation of the Uniform Ware-

house Receipts Act and the Uniform Bills of Lading Act, excluding the Negotiation and Transfer sections, which are covered by the Sales Article, and the Criminal Offences provisions of those Acts. The Article is primarily concerned with the definition of the contract-bailment obligation of the possessor of goods to the person to whom he has undertaken to deliver.

ARTICLE VII: "Secured Commercial Transactions." This Article will embrace the complex security transactions now dealt with as chattel mortgages, conditional sales, trust receipts, factors' liens, assignments of accounts receivable and field warehousing and pledge. It will deal with security taken in goods and accounts. The latest subdivisions of this Article (still subject to change) are: 1. Consumer liens; 2. Financing of specific inventory (of a kind heretofore usually covered by trust receipts); 3. Production financing (generally similar to present factors' liens); 4. Accounts receivable financing; 5. Agricultural financing of crops and livestock; 6. Pledge and field warehousing; 7. Industrial equipment financing; 8. Single venture financing.

The drafting group is also considering including in Article VII a certificate of title law with respect to motor vehicles. There is also considered an additional Article VIII to deal with the subject of "Commercial Agency."

Ill Spent Youth

"When I was a porter in a bar (how sweet those recollections are!) I studied Hegel's logic, just for fun; And while I manicured the floors and groomed the faithful cuspidors I argued with the patrons, one by one. I never stood dismayed and dumb when syllogisms wouldn't come, But filled the gaps with curses, here and there; And after several oaths profane my stalled ideas would start again, And that, dear friends, was how I learned to swear."

B. W. Williams in Chicago Evening Post

Sufficient Evidence

The defendant testified that he was a graduate of the University of Michigan, in the law department; that he was licensed to practice law in the courts of Illinois and the federal courts at Chicago; that he had been admitted to the bar in Texas and had represented various insurance companies in St. Louis for four or five years. *Held*, that there was ample evidence before the jury from which they could find that he was over sixteen years old. State v. Thomson, 155 Mo. 300, 55 S. W. Rep. 1013.

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